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Item No. 14

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SUNSHINE ORDINANCE TASK FORCE

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Completed by: Chris Rustom

Date: January 16, 2008

***This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

** The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.

Sunshine Ordinance Task Force

Hearing: John St. Croix before the Compliance and Amendments Committee

April 11, 2007

RK: Again Mr. St. Croix, thank you for coming, and we would like to hear what insights you can provide to us.

JSC: I basically think there was just one question you wanted me to ask, and I'm happy answer that, and any follow up questions. The question as I understood it was the lobbyist disclosure portion of the Sunshine Ordinance requires that there be disclosure of lobbying activities on behalf of the City that discloses how much the City is paying for lobbying services, and on which issues the City is lobbying either the state or the federal government or the unlikely or possibly rare occasion, other municipalities. Whereas the lobbyist ordinance that you would see in the City of San Francisco on the state level and the federal level is different in that it seeks to know who is influencing City, state and federal decisions, what they are spending, who is working for them. The requirements in the lobbyist ordinance, versus the Sunshine are more extensive, because essentially the Sunshine requirement is to say, who is out there lobbying for the City, what money is being expended on these expenditures and what is the purpose.

The lobbyist ordinance requires, not only the names of people lobbying but those people working for them, what their activities are, what their expenses are, the names of people contacted, whether there's campaign contributions involved with the lobbying, the amount of money that is spent on the lobbying and the amount of money that is paid to the lobbyist. So, the essential difference is the reporting requirements are different but the purposes are different.

RK: Mr. Comstock.

DC: We're trying to cut down the size of the Sunshine Ordinance as well as get it in order, do you think this, then, is entirely duplicative?

JSC: No because there's different people filing. Under the Sunshine Ordinance, the City is reporting what it is spending on lobbying on behalf of the City. The lobbyist ordinance, is larger in scope because it wants to know who is lobbying the City, not who the City is lobbying. So you have sort of two different flows.

EC: Would it be helpful at all, because I believe this provision tasks your commission with keeping track of the information and the records, is there any overlap that we should write into this? So for example, I understand what your point is, and that is really why we wanted you here was to try to figure out if this is already covered...if it's not...

JSC: There is really no overlap between the two, and there is not a great deal of staff time required for the reporting. It's a quarterly file.

EC: That's good. But is there anything that your office, to make it more consistent with the types of information that are covered by the lobbyist ordinance that we should amend to include, meaning is there anything that is missing from this ordinance, or any way that we could make it work more effectively?

JSC: I'm not aware of any, because in San Francisco, there is sort of a consensus requirement, that when the City decides to lobby on something, you know we have the state legislation committee that decides what the City is and is not going to support or perhaps, oppose. And there is a process. The Mayor, as the executive has the primary

authority to lobby for the City, but again, we have a separate process for legislation so a lot of time that is lobbying for federal grants or contracts of support for infrastructure development. The Board is generally free to do that as well, but generally the Board has its say in what it allows in terms of budgeting because there is usually a local component. So there's a certain amount of cooperation involved there in lobbying the state and federal government. Most of the lobbying goes on either to gain grant money or support for earmarks, I know it's terrible to use that word for it, but support for, let's call the infrastructure projects. So I don't think in that area of law there is a lot of conflict or a lot of concern that the City is doing untoward in efforts to gain approval for the state and federal things it wants to do. Funding for those things, and generally state legislation has its own committee that works on this. Federal legislation, generally the Mayor's Office has not a great lobbyist in terms of that per se. The Board of Supervisors occasionally may pass resolutions there, but that doesn't come under the definition of reporting. First of all, when the Board takes positions, they do it obviously in public and they are not getting paid \$300 or making contacts to do that.

EC: So then, from your perspective, if I may summarize, this provision in the Sunshine Ordinance covers a different segment of the population, it covers lobbyists hired by the City and County, and secondly, that it is working fine for what it is right now, and you don't see any need to amend it or strengthen it?

JSC: No, and if, at some point, there was any kind of problem or concern about the City's lobbying activities in Sacramento, Washington or other locations, we would all want to take an interest in it, but I'm just not aware that there are any issues there.

RK: OK?

DC: So then your recommendation to keep it as it is?

JSC: Yes, for the time being, and if you have follow-up questions, send them to me and I'll try to answer them.

RK: We thank you...

DC: We may have some other questions...

EC: I think the cover letter also mentioned 67.34 and 67.35, and ...

RK: Yes, 67.34 has to do with willful failure, and 67.35 the enforcement provisions, and I guess our question here is if this is duplicative in any way or treading on the toes of the Ethics Commission?

EC: I think our main question is, the problem, the background is, we have referred cases to the Ethics Commission under these provisions, but because of the way the ordinance is either drafted or the limitation of the powers of the Sunshine Task Force, generally speaking the answer back from the Commission has been no willful violation. That is my understanding of why we wanted Mr. St. Croix here, to help us figure out how, what we would need to do to beef up those enforcement provisions in order to give the Sunshine Ordinance more teeth and to assist and make it clear what the referral to the Ethics Commission meant and implied, and I think that was kind of the heart of it from my prospective.

JSC: I'm sorry, when I read this, I thought you wanted to know how 67.34 and 35 impacted the lobbyist ordinance. And they don't really apply to lobbyists for the City. In terms of willful failure shall be official misconduct, willful failure is difficult, a pretty high standard to be able to prove, and is a difficult milestone to reach in prosecuting a

case, and that's just off the top of my head. Under the Charter, certainly under the Brown Act there are certain rights and due-process procedures that are implied and stated.

DC: Mr. St. Croix, your summary of the enforcement of cases that's on your website, every single time the Sunshine Task Force has referred something to you for enforcement, we get back a notice that it was dismissed because "the facts did not support a finding of a violation." I'm very troubled by that, because I didn't know that it was the responsibility of the Ethics Commission to find a violation. Is that what you have to do?

JSC: In order to find willful misconduct, yes, there has to be a certain standard of evidence of violation and without parsing every single word of how these things are written, the standard of evidence that we have to use, the bar, is a little bit high. I mean we are talking civil matters, so the preponderance of the evidence, not necessarily beyond any reasonable doubt. But it is still a difficult standard to achieve, particularly in the past there was a certain amount of due diligence the Ethics Commission was not able to achieve. I think it is different now, because we have more staffing and a little bit more resources than we've ever had before, but that is fairly new.

DC: Is one of the difficulties you have is that it is not spelled out in the Sunshine Ordinance, I'm wondering if we need to make a change—for example the Florida Sunshine Ordinance—it says, a violation of (their) Sunshine Ordinance "each instance thereof, a fine of \$5000 shall be imposed." Now if we had text like that, or a fine of \$1000 or \$150 or something, would that make your job easier?

JSC: The short answer would have to be I think so, in that most of the things we prosecute are certainly levels of violation, we have a long schedule of fines and other things, you know, the most minimal of which is some sort of verbal or written reprimand, moving up to small fines and then up to fairly substantial fines, given the circumstances of the case. That makes it easier, in terms of jurisdiction to say, yah, there's not only probable cause, but there is sufficient probable evidence that we can go forward and then adjudicate appropriately what the response should be. You know, there are rules according to those that make it a little bit easier for us to be less arbitrary, so that, someone who is a long-time candidate, for example is expected to know the rules better than a first time candidate—that sort of thing. The level of public harm—somebody who receives illegal contributions, you know, a substantial amount that gets elected, commits greater harm than someone who gets the same amount, but doesn't get elected. There's standards that are there, some of them are discretionary and some of them are prescribed in law, but there's more of a schedule of violations in most of what we do.

DC: I guess we need to know what level of evidence we need to provide in order for you to be able to accept that evidence as evidence of a violation. Since we don't have subpoena power, you know, we can't subpoena records and say, investigate to find out whether they were actually withholding documents, that they had in their possession for example, well you do have that subpoena power, is that not true?

JSC: Yes.

DC: And have you ever used that subpoena power to your knowledge? On cases that were referred from Sunshine Ordinance Task Force?

JSC: Well, I really mean no disrespect by this, but I can't discuss specific cases. But I can tell you that I have recently used the subpoena power for the first time, by recently I mean in the past year or so, and we are starting to use it more, but in the past again, particularly in the first ten years or so of the Commission I think due to lack of experience and resources investigations didn't necessarily go that far.

EC: Actually, wasn't subpoena power just recently conveyed on the Commission?

JSC: The Commission didn't always have subpoena power, I believe and I don't know this, I believe they got it at the time in the middle of the Commission's existence when it was reconstituted.

EC: Right, when it was reconstituted by Charter, I believe.

JSC: I got it, I personally got subpoena power last year.

RK: Mr. St. Croix, run us through the procedure when the SOTF refers a violation to the Ethics Commission. Run us through the procedure I'm interested in what happens, I'm also interested in whom you call to testify or don't call, what happens?

JSC: Well, like any case that is referred to us, we look at anything that is presented to us by the complainant. In your case it would be the Task Force. What materials were forwarded to look at those to see what the source was to try to verify any of those. I can't say it's normal to contact the respondent, because contacting the respondent is not the wisest move, though in the case of the Sunshine Task Force, it probably would be, to get the facts of the case from that person. There would usually, I suspect, be an attempt to contact and discuss this with the original complainant that filed the complaint here. And then the determination, and this is the difficult part, to determine, based on both sides testimony, whether something was deliberate or not, and what level of willfulness there was, and whether there were any extenuating circumstances. I'm only familiar personally with one of those complaints. I'm aware of four sunshine complaints to the Ethics Commission and...

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so then assuming that the Ethics Commission found that there might be some validity to that, complaint, in addition to just talking to the original complainant and respondent, they would be given the opportunity to offer other people who might provide any valid information. There might be some records requests, in more serious cases where records requests were recused, then we would start looking into subpoenas. We might be contacting people's superiors in the case of City agencies. Well, we are almost always dealing with City agencies, but in this particular case.

EC: So what can we do to provide, if we were to refer something to you in the future, to make your job easier?

JSC: I'm not sure if there is anything that you can do to make it easier, investigations are difficult by nature. One of the things I am sure is frustrating to you is, once we begin a complaint, the provisions in law about not discussing them are fairly standard, and for the purposes of execution, even though this is forwarded by the Task Force, you are not considered the complainant who has access to the ongoing information of the investigation, it is the person who filed the original complaint. And then the question would be, if you made the Task Force party to that information, how many people on the Task Force get to know the confidential portions of that investigation? And how do you keep that under wraps because the respondent has rights under the process. And under the Brown Act the confidentiality and enforcement investigations is the only place where we really have confidential information is to the extent allowed by state law. So it is difficult to quantify what specific changes might change that process.

EC: The provisions that are and this is a bit off my initial questions, but in terms of the rights of the complainant, so if someone files a complaint with the Task Force, we find it valid, we find that there has been a violation of the ordinance, by a City employee or officer, we refer it to the Ethics Commission, it becomes an investigation, so what you are saying is that there is certain information that the complainant is entitled to at that point?

JSC: Well, we don't give the complainant information about the ongoing investigation, we do engage them in discussions of the information they have. We don't give the complainant other information gathered away from them in any case.

EC: Right, but when you were prior to discussing, that is what I was trying to get at, what the difference is in the information you can provide to them...

JSC: Well, if it's the same thing, if we needed more information, we could come to you and discuss what we were looking for, but again, because that would mean open session, there's a delicate nature to that, whereas the person who filed the complaint with you, we could interview behind closed doors to get...now you've seen...I'm not just talking about Sunshine complaints in particular, but there are complaints pending where sometimes the complainant goes public with whatever they gave to us, I can't control that. And there are sometimes a respondent goes public.

EC: That's similar to Grand Jury rules, they have the right to do that.

JSC: I'm not a judge, and I can't slap a gag order on somebody, and God knows I wouldn't want to have to deal with any of that anyway, but there's nothing in the law that says well the complainant has said all this, and the respondent has said all of this, why can't you comment on it. I get that from the press all the time. "It's out there, talk to me." And I can't. And sometimes complainants have said "I waive my right to privacy" well you can't waive away the respondent's right. You know, so there's a thing about

investigations and one of the reasons why the state has allowed them to remain confidential, there are processes, conducts and mindsets in investigations, and you're not required to give those away because it's like showing your plans to the other team, you know your plays to the other team or your plans to the other side, there are certain strategies that you are not required to give away. In the end, of course, if there is a settlement agreement, or somebody is found in violation of the law, people can piece together what they will, but in the case where a case is dismissed or found to have no basis, then there's not a whole lot of information that comes out of that.

EC: Which is the state law that provides for confidentiality in this area?

JSC: Mostly the PRA.

EC: Exemptions in the PRA, 6254 or something around there?

JSC: If you look at the provisions in the Brown Act and in local law, confidentiality requirement locally, is to the maximum permitted by state law.

EC: Right, I'm trying to figure out which of the state laws that govern in this area...

JSC: Well, I'll follow up and get that to the committee, but I can't cite it chapter and verse off the top of my head.

EC: Right, well, I'm curious about that.

JSC: I have a big black book on my desk and every day I take it down and flip through it and...

EC: That would be interesting information for me in terms of trying to figure out whether and what kind of provisions that we might be considering for tracking purposes. Obviously, there are certain things we can allow more than is permitted under state law, but to the extent that state law prohibits information from being produced, we can't necessarily trump that.

JSC: That word permitted is different than required.

EC: Exactly, so in terms of trying to figure out what powers or information that we may want to provide or – in our ordinance it is important for us to figure out which provisions of state law are governing for example the Ethics Commission.

RK: I know also there are some provisions of the City Charter that mandate confidentiality, now are those in conformance with the CPRA or are they separate or where does that fall into...

JSC: My understanding in general is they are modeled after the state law, and for a long time the drafters of such things generally did try to conform to state law, and in fact there

is a lot of redundancy enshrined in local law and it wouldn't have to be because it would apply anyway, and I think the original thinking was, because we are a charter city, let's make it local law and then if we need to make adjustments to it and we can. There are some benefits to being a charter city in that state law doesn't exclusively trump local law, unless – you know all this – unless of course it says it does, but...

RK: OK, Mr. Comstock.

DC: So when an item is referred to the Ethics Commission from the Sunshine Task Force, is it treated like a complaint for investigation?

JSC: Yes. It is a confidential complaint.

DC: OK, so could you walk us through that, I'm looking here at C3699-13 Investigation Enforcement Proceedings and the first process would be for you to refer it to the city attorney or the district attorney? Is that how...

JSC: Any complaint that comes is outlined and a letter is sent automatically to the city attorney and the district attorney and they are allowed to assert jurisdiction. And they have a certain amount of days to do that. And that doesn't happen often, there have been occasions -- it's more common for them to say "let's work on it together."

DC: So when that part is over, then a decision is made at the commission level as to what action you plan to take? And that written commentary is sent to the person?

JSC: Well, the, generally the complaints are acknowledged, unless they are anonymous and there is an initial stage where we try to determine if there is any validity to the complaint. I do not imagine there would be any time when we would tell the Task Force there is nothing here, because you have already had a formal hearing process. But there are times individuals file a complaint that for whatever reason, we would decide not to pursue at all, and this would happen if someone filed an identical complaint multiple times that has already been adjudicated for example. If there was an anonymous complaint without any kind of evidence or back-up or whatever—that doesn't happen often, but we do have the option, we usually run those through the commission. But the next step would be for the investigator to the course of action in the investigation and they would plot that out as their own work process.

DC: So, just reading from the law, the then Commission tells both sides what action they plan to take or if no action, the reasons for not taking any action, and that is delivered to them within 14 days...is that usually the way it is ...

JSC: Ummm, yeah, unless there's...in order to make an initial determination, sometimes we have to have an initial investigation, but the letters to the City Attorney and the District Attorney go out automatically at that point. And then there could be, not required necessarily, but during the course of an investigation, if information comes in that was not available, that might change the course of the case, we might recontact them, for

example if we uncovered criminal activity, that wasn't alleged in an original complaint, we would have to contact the District Attorney.

DC: So, it says here, if no decision has been made within 14 days, the person who made the complaint—or in this case that would be the Sunshine Ordinance Task Force, would you treat this in the same way, that within 14 days, we would be notified of the reasons, for example if there were a delay?

JSC: Yeah,

DC: I don't remember that happening so far.

JSC: Well, I don't recall that we ever determined not to pursue a case that you sent for us. Ummm, admittedly the investigations for the referrals that you made have taken, at least in three cases, a considerable amount of time. But again we had, and again I'm tired of sounding like a broken record, when I got here we only had one investigator. He had only been working there a few months, and we went for five months without an investigator and another four to six with an investigator that only worked half-time, so there was a long log in that 2002-2004 period where there wasn't any movement at all on these cases.

DC: Um , then you have findings of probable cause?

JSC: Findings of ... should the staff of the investigation gather enough evidence to suggest that a violation occurred, we then make a report to the Ethics Commission in closed session, saying "we need to do a full-fledged investigation of this." At that point it's kind of an authorization to do a full-blown investigation, as opposed to the preliminaries, interviewing witnesses and stuff. We normally wouldn't issue subpoenas until after a probable cause hearing, although we are not necessarily prohibited from doing it earlier. And again that depends on how much evidentiary material there is.

DC: The probable cause hearing is before the Commission?

JSC: Before the Commissioners, again that's in closed session. The respondent is allowed to appear, with or without representation in a probable cause hearing. And after the probable cause hearing we actually make a public accusation. So the most significant thing about the finding of probable cause is that it makes the accusation public. That's only happened to my knowledge one time in the Ethics Commission's history. And once again, I'll say, because lack of resources and everything else, they've never gotten there before.

RK: Mr. St. Croix, as we've gone through the ordinance in the amendments process, we've been considering amending the ordinance to give the Sunshine Ordinance Task Force a lot more teeth than it has now, including the ability to subpoena, including the ability to prescribe penalties and fines, etc. Would that make your job any easier? Would it make it more difficult? Is that something the Ethics Commission would be uncomfortable with, or would like?

JCS: I can't...I'm representing the Ethics Commission today, and in order to answer a question like that, I would have to go to them, because I'm not authorized to say one way or the other that they would want to endorse something that might actually dilute their authority and I'm not comfortable speaking to that.

RK: OK, maybe you could query them on that and, without having to come back here, give us some kind of a written response?

JSC: I'm happy to do that in a general way, if you want more specific responses from them, I'd like questions in writing and I'll take them to I'll get you answers in writing.

RK: OK, if you could make a general query to them ...

JSC: Why don't I do that and get an answer you and if you want to follow-up with something more specific, than I'll do that.

RK: Thank you, any other questions?

DC: We are in the process now, as you know, of revamping these specific sections, and when we do have some changes, I'd like to forward those on to you for your comment if that is allowed, I guess just for your personal comment because of the experience you have with Ethics and the way it's run, so that if something stands out that looks like it would be unenforceable, you could alert us to that.

JSC: I'm happy to give it what I would consider an administrative review, I'm hesitant to make personal comments on things in general because, almost always, when I'm in public I'm representing the Commission and I'd like to avoid the confusion of when it's me and when it's me with the other hat on, I know a lot of people in town wear a lot of hats and it just gets very confusing sometimes.

DC: Well that certainly would be helpful, this is the nitty-gritty part of it, and most of the complaints that we hear coming from the public come from the fact that a lot of time is wasted with no enforcement, you know and we get a lot of that complaint and it's a constant diet for us that is very difficult to digest. We are working assiduously to find some solution to this problem and we are allowed to refer things to Ethics or to the District Attorney and to the Attorney General, and that's about it for enforcement and we don't have any real enforcement power of our own. And so far, we've batted zero, so it's a serious problem for us.

JSC: I can say that, at least to a degree, I'm empathetic, we're in a difficult line of work, and it can be very frustrating, and I understand that.

RK: Well, I think part of the problem is that, in the past, as you have pointed out Mr. St. Croix is that you have been understaffed. And that, I think, is one of the reasons why a lot of the complaints we have sent to Ethics you have just been unable to deal with them, so that is not a criticism, it is just a cold hard fact of life.

JSC: And in fairness to us, as we have been able to start pursuing actual work on some of these complaints, people are ticked off that we are able to do it rather than ticked off that we couldn't do it in the past.

DC: When we send an Order of Determination or when we refer something to you, do you need more information from us with regard to what laws we feel have been violated or are our Orders of Determination complete enough?

JSC: It doesn't hurt, we already kind of know most of that stuff, I mean, our investigators all have law degrees, so what they don't know we either get advice from the City Attorney or they can research themselves, and given your lack of resources, I'm not sure that is something you need to do.

RK: Any other questions?

EC: I just want to thank Mr. St. Croix for coming, I think this has been very, very helpful.

RK: What I'd like to do is have public comment now on the conversation we've been having with Mr. St. Croix, and perhaps Mr. St. Croix would like to give any of his observations following those public comments, and I believe we do have somebody to speak now.

Public Comment

Kimo Crossman: Hi, Kimo Crossman. I just wanted to throw out a couple of things. I think there is some dispute about whether the SOTF can go into closed session or not, currently, I don't see anything that restricts the SOTF from going into closed session, currently today, and if that's the case that might allow them to be a participant in a complaint today, without any changes to the ordinance. It would also be a way for them to review documents that are disputed, today, if a department brings them to the meeting, but refuses to disclose them in public. In addition, I believe there is a move afoot at the Ethics Commission to redo the fee structure, and there is some dispute about how that might come about. It might be informative to the Task Force to learn about how they go about that, because it might inform you guys about how you want to address it as well. I know there has also been a lot of back-and-forth about waivers as well, of fees, and then lastly, I want to remind the Task Force that there is some dispute about the definition of willful misconduct: Allen Grossman, an attorney of fifty years, pointed out that, if it is your duty to follow certain tasks, and you chose not to do them, then it was his opinion that that was willful misconduct and there wasn't this need for a huge pile of evidence that some people feel you have to have. It's your duty, you have to do it, it is clearly laid out in the ordinance that it is willful misconduct, so that is his opinion on the matter. Thanks.

RK: Thank you, the Chair will observe that there is nobody else in the audience section. Mr. St. Croix do you have any observations about the comments just received?

JSC: I'm not aware of the law or the logic behind what the Task Force can, and cannot do, I'd have to refer those requests to the City Attorney. I think a lot of people see willful misconduct and think they know it when they see it, but I think being able to prove it in court is a little more difficult than the assertion that was made.

RK: Thank you. I believe...Mr. St. Croix thank you very much for all the time you spent her this afternoon, your comments are very helpful and very much appreciated.